NOTE

THE DUAL FACE OF THE AMERICAN JURY: THE ANTIAUTHORITARIAN AND ANTIMAJORITARIAN HERO AND VILLAIN IN AMERICAN LAW AND LEGAL SCHOLARSHIP

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INTRODUCTION

Over the past fifty years, the Supreme Court has extended and elucidated the right to trial by jury.1 A handful of commentators have argued that modern Supreme Court decisions signal a shift in the Court’s jurisprudence on the jury toward a more functionalist approach that is sensitive to the competencies of juries and their historic role as protectors of liberty in American democracy.2 Consequently, some commentators have argued that circuit courts should follow the Supreme Court’s lead by leaving behind the formalist distinction between the judge’s law-finding and jury’s fact-finding authority that courts have made since the late nineteenth century.3 This shift, some commentators argue, would give the jury more authority to decide questions of law and may even pave the way for the jury’s right to nullify the law as instructed by the judge.4


2 See United States v. Polizzi, 549 F. Supp. 2d 308, 437–38 (E.D.N.Y. 2008) (“[C]ourts must now interpret Sixth Amendment questions in light of the jury’s role in colonial times, when juries knew of—or were informed by the court of—the applicable sentences and had the recognized ability to dispense mercy.”); Lance Cassak & Milton Heumann, Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases, 4 RUTGERS J.L. & PUB. POL’Y 411, 483 (2007) (arguing that recent Supreme Court decisions on jury sentencing espouse “principles or grounds for further expansion of the role of the jury”); Arie M. Rubenstein, Note, Verdicts of Conscience: Nullification and the Modern Jury Trial, 106 COLUM. L. REV. 959, 975–77 (2006) (arguing that the Supreme Court’s decision in Duncan marked an end to the Court’s century-old formalistic jurisprudence on the jury); see also David C. Brody, Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right, 35 AM. CRIM. L. REV. 89, 91 (1995) (“[T]he question of whether to instruct the jury of its power to acquit against the weight of the evidence must be resolved through consideration of the benefits and harms that such an instruction would produce.”); Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 MICH. L. REV. 1149, 1154, 1170 (1997) (“[O]ur conception of the rule of law has been considerably revised in recent decades and has, at least for many scholars and lawyers, largely shed the unpersuasive formalist and positivist premises on which descriptions of nullification are often based.”).

3 See United States v. Polouizzi, 687 F. Supp. 2d 133, 199 (E.D.N.Y. 2010) (arguing that the Second Circuit’s antimullification decision in United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997), is no longer “in step with current Supreme Court practice on the Sixth Amendment,” and that therefore the Second Circuit should move beyond Thomas by recognizing that certain circumstances require judges to inform juries of mandatory minimum sentences at the guilt phase); Cassak & Heumann, supra note 2, at 483.

4 See Robert E. Korroch & Michael J. Davidson, Jury Nullification: A Call for Justice or an Invitation to Anarchy?, 139 MICH. L. REV. 131, 137 (1995) (arguing that the Supreme Court’s recent “line of decisions can be interpreted as suggesting that the Court supports the infusion of community sentiments in jury verdicts, and would sanction occasional jury verdicts that conflicted with unfair laws or oppressive prosecutorial practices”); Rubenstein, supra note 2, at 960 (“During the nineteenth century[,] . . . the Court condemned jury nullification, and lower courts continue to depend on those decisions today. However, in modern times the Court has indicated that the boundaries of the right to a jury trial should be
This Note argues that because judicial treatment of the jury differs drastically depending on whether courts address a question of jury nullification directly or a question of the right to trial by jury more generally, judges construct complex and contradictory images of the jury that have led to confusion and tension in the jury nullification debate. It proposes a framework for understanding the jury nullification debate in which judicial characterizations of the jury are shrouded in antiauthoritarian and antimajoritarian rhetoric. This framework illustrates how judges construct antiauthoritarian images of the jury by describing the jury as a representative body that protects defendants against potential abuse and oppression by prosecutors and judges, and antimajoritarian images of the jury by describing the jury as a rogue minority that undermines the law enacted by a publicly elected, representative legislature. More importantly, it explains how these seemingly contradictory characterizations of the jury are not merely the product of haphazard or nonsensible judicial flip-flopping, but are the product of deliberate judicial construction that varies directly with the legal issues that courts address. Thus, when courts address a defendant’s right to trial by jury where the issue of jury nullification is not before them, they are likely to expound on the antiauthoritarian virtues of the jury and the importance of the jury as a check on biased judges and arbitrary prosecutors. By contrast, when courts address the issue of whether a jury has a right to decide questions of law or “nullify” the law with an acquittal, they are likely to emphasize the antimajoritarian character of the jury by describing the danger of “jury lawlessness” and the fear that juries will undo the laws made by publicly elected legislatures. This dichotomy in judicial characterization suggests that both the Supreme Court and appellate courts continue to take a legal formalist approach to their jurisprudence on the jury when they deal with issues of jury nullification despite non-nullification opinions that might suggest a shift toward a more functionalist approach to the jury’s authority.

constructed around considerations of the jury’s purpose. This newer, functionalist conception of the jury’s role is more compatible with nullification.

5 Compare Duncan, 391 U.S. at 155 (“The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”), with Sparf v. United States, 156 U.S. 51, 101 (1895) (“Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves.”), and United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam) (“Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.”).

6 United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (quoting Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18 (1910)) (warning that nullification instructions would encourage “[j]ury lawlessness” and sacrifice the “rule of law” to the “rule of lawlessness”).
Part I of this Note introduces the jury nullification debate. Part II describes the law- and fact-finding roles of early colonial and American juries. It introduces utilitarian and “safety-valve” views of the jury’s authority that judges invoke to justify their holdings in jury nullification cases, and explains how these views reflect functionalist and formalist approaches to determining the scope of the jury’s authority. Part III introduces a framework for understanding judicial opinions on the jury’s authority, whereby courts characterize the jury as antiauthoritarian or antimajoritarian depending on whether the issue of jury nullification is directly before them. Specifically, courts classify the jury as an antiauthoritarian protector of liberty when the issue of jury nullification is not before them and as an antimajoritarian threat to democracy when it is. By dissecting Judge Harold Leventhal’s influential United States v. Dougherty opinion, Part IV demonstrates how Judge Leventhal uses utilitarian balancing to minimize the modern salience of the jury’s historical antiauthoritarian strand and justify the jury’s power to nullify the law, as instructed by the trial judge, as an act contrary to the rule of law instead of a routine mechanism of the jury’s democratic participation in the criminal justice system. It shows how despite Judge Leventhal’s reliance on utilitarian balancing, his functionalist analysis is merely a rhetorical tool through which he weaves the antiauthoritarian strand of the jury’s history into a story that justifies the sharp demarcation that modern courts draw between the judge’s law-finding and the jury’s fact-finding authority. Thus, Part IV posits that his opinion is consistent with a formalist jurisprudence to which the Supreme Court and lower federal courts have adhered on jury nullification issues.

Part V discusses how courts’ dual characterization of the jury as antiauthoritarian and antimajoritarian creates confusion in the jury nullification debate. It discusses how judges and commentators may mistakenly rely on utilitarian balancing to argue for a broader scope of the jury’s authority by citing judicial opinions in non-nullification cases where courts praise the jury’s antiauthoritarian characteristics. Part VI concludes that judges and commentators who argue for an expansion of the jury’s authority by referencing the emphatic antiauthoritarian language in non-nullification opinions will likely meet reversal or make inaccurate predictions about future court behavior because they overlook the centrality of the jury’s antimajoritarian character and the formalistic view of the jury’s authority espoused by cases that directly address jury nullification. It explains that the fault with these arguments is not the empirical foundations of their assumptions about the relative competencies of judges and jurors, per

7 473 F.2d 1113 (D.C. Cir. 1972).
se, but the fact that the predominant “safety-valve” view of the jury’s authority creates a bright-line rule in which all questions of law are determined by the judge and all questions of fact are determined by the jury. Part VI suggests that a formalist jurisprudence on the jury may cabin the jury’s authority excessively and discourage the use of jury instructions that could produce more just verdicts. Lastly, Part VII emphasizes the importance of bridging the rhetorical divide in the jury nullification debate and suggests that proponents of a more expansive role for the jury can enhance the quality of their arguments by directly confronting the divide.

I 
JURY NULLIFICATION BACKGROUND

Under most definitions of the term, “jury nullification” occurs when a jury acquits a defendant who it believes “is guilty under the law.” The term, however, is an umbrella term for many different types of jury behavior. Darryl Brown delineates four categories of jury nullification: nullification in response to norm violations, nullification in response to biased or unjust applications of law, nullification in response to uncorrected rule violations, and nullification to uphold illegal and immoral community norms. In the first category, the jury acquits because it believes the law is “fundamentally unjust.” In the second category, the jury acquits because it believes conviction would result in an “unjust application of an otherwise just law.” In the third category, the jury acquits to avoid sanctioning egregious state conduct with a guilty verdict. And in the fourth category, the jury acquits because it holds a bias for the defense or against the prosecution. Acquittals of white civil-rights violators by all-white juries are emblematic of this last category of jury nullification. For Brown, this category is the only one that is inconsistent with “the rule of law” because the jury’s acquittal is based on prejudice rather than a conscientious objection to the law or the behavior of the prosecutor or judge.
Unlike Brown who tries to locate certain categories of jury nullification within “the rule of law,” Thomas Regnier disavows the term altogether.\textsuperscript{18} He explains that jury nullification is a pejorative term that the founders never used.\textsuperscript{19} According to Regnier, a jury weighs law and fact to reach a “just verdict.”\textsuperscript{20} Thus, he explains, “[w]hat has come to be called ‘jury nullification’ today is merely an occasional by-product of a jury’s right and duty to determine the law and the facts complicately.”\textsuperscript{21} Consequently, juries do not nullify but reach “verdict[s] according to conscience.”\textsuperscript{22} On Regnier’s view, when a jury disregards a judge’s instruction on the law, the jury’s behavior is dubbed “nullification” only because courts do not recognize the jury’s right to independently judge the law. Because judges view the law as purely within their domain, a jury verdict contrary to a judge’s instruction must mean that the jury has also made a judgment about the law and has thereby usurped the judge’s authority. For Regnier, the jury has merely done its job by judging both law and fact to reach a just verdict.\textsuperscript{23} The term “nullification” is therefore merely a judicial construction to denigrate a jury verdict that represents an encroachment on what judges believe is their exclusive province to determine questions of law.\textsuperscript{24}

II

UTILITARIAN AND SAFETY-VALVE VIEWS OF JURY AUTHORITY

Juries in late eighteenth- and nineteenth-century America decided both questions of law and questions of fact.\textsuperscript{25} The Supreme Court ultimately withdrew the jury’s authority to determine questions of law in 1895, in \textit{Sparf v. United States}.\textsuperscript{26} The Court’s holding that the jury has only the right to decide questions of fact, and not law, is

\textsuperscript{18} Thomas Regnier, \textit{Restoring the Founders’ Ideal of the Independent Jury in Criminal Cases}, 51 SANTA CLARA L. REV. 775, 778 (2011) (“I prefer instead to speak of ’jury discretion,’ ’jury independence,’ or a jury’s right to reach a ‘verdict according to conscience.’”).

\textsuperscript{19} See id. at 776.

\textsuperscript{20} Id. at 777.

\textsuperscript{21} Id. at 778.

\textsuperscript{22} Id.

\textsuperscript{23} See id. at 777.

\textsuperscript{24} See id. at 778.


\textsuperscript{26} See 156 U.S. 51, 106 (1895). The Court did not base its holding firmly within any constitutional clause or amendment. In particular, the Court mentioned neither the Sixth nor the Fourteenth Amendment. In this regard, its opinion is typical of many jury-nullification opinions, which reiterate tried disapproval of jury nullification without referencing constitutional text. See, e.g., United States v. Trujillo, 714 F.2d 102, 105–06 (11th Cir. 1983) (citing only case law for its disapproval of jury nullification); United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam) (same); United States v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969) (same).
widely understood as the “final and authoritative denial of the [jury’s] right” to decide questions of law, and concomitantly, its right to nullify the law as instructed by the judge.27

To justify the modern scope of the jury’s authority in both nullification and non-nullification cases, courts mix two lines of reasoning—consequentialist and deontological—that reflect, respectively, functionalist and formalist jurisprudence.28 One can categorize these accounts as utilitarian and “safety-valve” views of the jury’s authority. Both views help shape courts’ antiauthoritarian and antimajoritarian constructions of the jury.

A. A Utilitarian View of Jury Authority

In the years leading up to the American Revolution, the jury became a center of politicized debate between the Crown and colonists.29 Colonial Americans saw jury verdicts as “formal expressions of public will,” embodying the colonists’ resistance to imperial rule.30 The jury’s real, if not fully realized, power to nullify unjust imperial law, check the caprice of biased judges, and bring authoritarian magistrates to justice gained ideological salience in pamphlets and even mock criminal trials of magistrates, where individuals acted out the roles of accused, judge, jury, prosecution, and defense.31

27 Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 589 (1939).
30 Id. at 56. In the years leading up to the Revolutionary War, Parliament severely restricted the jury trial in the colonies. Because the colonial juries could shield resisters from punishment, Parliament expanded use of juryless admiralty courts and imposed the “Coercive Acts” on Massachusetts, which allowed the royal governor to transport individuals accused of certain crimes to Middlesex for trial. See id. at 53, 57–58; see also Thomas Jefferson, A Summary View of the Rights of British America 15 (1774), available at http://www.wdl.org/en/item/117/ (decrying the emptiness of a jury trial conducted before individuals foreign to the community and the case, which effectively denied those accused the “privilege of trial by peers” and subjected them to “judges predetermined to condemn”).
31 The rhetoric of “trial by jury” galvanized popular support against British rule. In a mock “show trial” in 1774, for example, Virginians indicted Lord North for high treason for imposing unconstitutional taxes. They arraigned him and impaneled a “special jury of freeman” to hear North’s defense. The jury deliberated and rendered a guilty verdict. The actor in the role of North then confessed to his crimes, begged for forgiveness, and warned other magistrates not to repeat his mistakes. Despite the pretend-North’s contribution, the jury hung and burned him in effigy. In 1765, Richard Henry Lee enlisted his slaves to perform a show trial of Prime Minister George Grenville and the local stamp collector George Mercer in response to the Stamp Act. They too were found guilty, their effigies hung and burned. See Blinka, supra note 29, at 56–57. The rhetoric of “trial by jury” in colonial America is a good example of the contradictory character of the jury. In
For the founders, the jury’s ability to represent community sentiment was a central component of its authority. Nevertheless, the jury’s power to determine both law and fact evoked ambivalent sentiment among even one of its most ardent supporters. Although Thomas Jefferson expressed deep admiration for the “twelve honest men,” he was also concerned with the potential caprice of juries. Jefferson feared that orators like Patrick Henry could twist jurors’ emotions and manipulate jurors with their “golden throat[s] to irrational verdicts.” Even still, Jefferson believed the jury had the right to decide questions of fact and law and expressed a very utilitarian argument for this right. For Jefferson, the jury’s “common sense,” even with its potential for irrationality, was a necessary threat to democracy, and a lesser one than biased judges. According to Jefferson, although the jury had the power to determine both law and fact, it often deferred to the expertise of the judge on questions of law and only used its discretion to determine law in cases involving “liberty” or a “biased judge[.]”

Thus, Jefferson’s belief in the jury’s right to decide questions of law and fact was the product of a utilitarian balancing of the virtues

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Lord North’s trial, the mock jury was itself “predetermined to condemn” and showed no mercy despite North’s contrition. See Jefferson, supra note 30, at 15. Notwithstanding the importance of the “jury of freeman” to the trial by jury narrative, show trials conscripted slaves to play the roles of jurors. The entire trial was an act of contrived justice intended to channel the views of the masses through political theater. For a discussion of how political theater has “illuminate[d] the culture of democracy” since ancient Athens, see Emiliano J. Buis, How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals, 16 FLA. J. INT’L L. 697, 721, 724 (2004).

32 See Blinka, supra note 29, at 71 (“Jury sentencing fully comported with the floodtide of republican rhetoric, the experience of local committees and the revolutionary precedent that required the use of juries in admiralty litigation.”).

33 See Thomas Jefferson, Notes on the State of Virginia 130 (William Peden ed., 1972) (1787); Blinka, supra note 29, at 57 (“The common-law jury’s raw power to determine facts and law insulated the people from oppression by the king, judges, and even legislatures.”).

34 See Blinka, supra note 29, at 48 (quoting Merrill D. Peterson, Thomas Jefferson and the New Nation: A Biography 20–21 (1970)).

35 See id. at 98.

36 Id.

37 Id. at 101 (quoting 2 The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776–1826, at 1076 (James Morton Smith ed., 1995)).
and dangers of judges and jurors, reflecting a functionalist approach to the jury’s authority. Although Jefferson acknowledged that jurors were sometimes ignorantly swayed by their emotions or external motivations, he concluded that they were best able to make decisions for the “general welfare,” preferring the “honest ignorance” of jurors to the “perverted science” of judges. The jury’s ability to represent community sentiment and make decisions for the general welfare made it an essentially democratic institution. The importance of the jury trial to the notion of liberty in a democratic society is underscored by the severe restrictions Parliament placed on the jury right in the colonies in response to colonial juries’ refusal to enforce unpopular laws by acquitting violators and the subsequent charge against King George II for restricting the jury trial in the Declaration of Independence.

B. A Safety-Valve View of Jury Authority

In denying the jury’s right to nullify, modern judicial opinions have capitalized on the idea that the jury is a “safety valve’ for exceptional cases.” Under this view, if any balancing exists, it must stop at a deontological minimum, where the jury is the last protector of the individual against arbitrary authority. As discussed below, courts and commentators have woven the notion of the jury as a safety valve into an evolutionary story of the jury in American history; once the American system of government grew stable roots, the jury was no longer necessary as a regular check against biased judges and therefore its role could be relegated to its deontological minimum as a safety valve of the criminal justice system.

The safety-valve view of the jury comports with William Blackstone’s criticism of John Locke’s social contract theory, an important justification for the American Revolution. According to Locke,
“there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it.”45 Blackstone suggested that regardless of the merits or necessity of Locke’s theory, giving the theory legal significance was paramount to anarchy.46 As Blackstone explained, “however, just this conclusion may be, in theory, we cannot practically adopt it, nor take any legal steps for carrying it into execution, . . . for this devolution of power, to the people at large, includes in it a dissolution of the whole form of government . . . .”47 Here, Blackstone essentially expresses a safety-valve view. Although “removing or altering the legislative” when it acts contrary to the power entrusted in it by the people may be necessary in extreme circumstances, this act can never be given legal significance.48 Similarly, opinions that adopt a safety-valve view of the jury reason that although juries can nullify the law since their acquittals are unreviewable, and in some rare circumstances nullification is crucial to protect American democracy as a last resort, this power can never be given the legal significance of a “right” because to do so would invite anarchy and lawlessness. Thus, under the safety-valve view, the jury’s nullification power represents an absolute floor of protection against tyranny but is not a regular component of the jury’s democratic participation in the criminal justice system.49

The safety-valve view is also consistent with the idea that the founders set in motion a gradual shift in power from jury to judge when they established an independent judiciary in the Constitution. St. George Tucker praised the new nation as “the first in which this absolute independence of the judiciary has formed one of the fundamental principles of the government.”50 Thus, Tucker explained that unlike their royal counterparts, federal judges would be a “calm, temperate, upright”51 shield protecting individuals from “the sword of & Abraham Small 1803). In a footnote to this text, St. George Tucker wrote, “[t]his principle is expressly recognized in our government.” Id. at 161 n.25.

45 Id. at 161 (quoting John Locke, Second Treatise of Government § 149 (C.B. MacPherson ed., Hackett Pub’g Co. 1980) (1690)).

46 Id.

47 Id.

48 Id.

49 For those like Thomas Regnier who see the jury-nullification power as central to the regular mode of jury participation, a jury verdict always requires the jury to determine law and fact “complicately.” See Regnier, supra note 18, at 777 (emphasis omitted). Justice James Wilson expressed a similar view when he wrote, “in many cases, the question of law is intimately and inseparably blended with the question of fact: and when this is the case, the decision of one necessarily involves the decision of the other.” Wilson, supra note 38, at 219–20.

50 1 Tucker, supra note 44, app. at 354.

51 Id. app. at 355.
 usługed authority, the darts of oppression, and the shafts of faction and violence.”

While Tucker acknowledged the importance of the jury as a check on judicial power, his treatment of the jury was rather dismissive and conclusory. This treatment is consistent with an understanding of the jury as a safety valve. Although Tucker gave lip service to the idea that the jury is an important constitutional safeguard, he focused on independent judges as the check against legislative and executive abuse. To this end, Tucker explicitly suggested that the judiciary was the main constitutional protector of individual rights. Thus, once the jury right was secured in the Constitution, attention could turn to the development of the judicial branch, whose judges Tucker believed would need to make significant strides toward the constitutional ideal of an independent judiciary that could adequately check legislative and executive abuse.

III

The Dual Character of the Jury in Judicial Opinions

The Supreme Court and lower federal courts not only hail the jury as a bastion of liberty, they also deride it as a seed of anarchy. When courts address a defendant’s right to trial by jury where the issue of jury nullification is not before them, they are likely to expound on the antiauthoritarian virtues of the jury and the historical importance of the jury as a check on biased judges and arbitrary prosecutors. However, when courts address the issue of whether a jury has a right to decide questions of law or nullify the law with an acquittal, they are likely to emphasize the antimajoritarian character of the jury by situating the jury in opposition to publicly elected legislatures and describing the jury as a rogue minority instead of a representative of the majority in its own right.

52 Id. app. at 357.

53 In his treatment of the judiciary, for example, Tucker addresses the jury only three times—first, where he acknowledges that the absence of a trial by jury provision in the Constitution was one of the main objections to it; second, where he recites the text of the Sixth Amendment; and third, in the final sentence of the section, where he notes that the provision in the Seventh Amendment that “no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law . . . removed one of the most powerful objections made to [the judiciary] department.” Id. app. at 351, 358, 361.

54 See id. app. at 355.

55 See id. app. at 357.

56 For example, Tucker lamented the conduct of two Chief Justices who served as foreign envoys while holding office on the Supreme Court. See id. app. at 356 (explaining how executive appointments threaten the impartiality of judges because they “have a natural tendency to excite hopes, and secure compliance”).

57 See supra note 5.

58 See supra note 6 and accompanying text.
A. The Jury as Antiauthoritarian

When courts address the jury right where the issue of nullification is not directly before them, they often expound on the antiauthoritarian virtues of the jury. These opinions go beyond mere description of the importance of the jury to the nation’s founders. They are works of hyperbole that not only wax eloquent on the historical importance of the jury but also expound on the jury’s institutional role as a safeguard against judicial overreaching. As an antiauthoritarian institution, the jury protects defendants against tyranny by interposing the conscience of the community between the defendant and government, and protecting the defendant against a biased judge or arbitrary prosecutor. In incorporating the right to trial by jury in Duncan v. Louisiana, the Supreme Court explained, “[t]hose who wrote our [federal and state] constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.”\(^\text{59}\) The Court stressed the importance of the jury as a check on judicial overreaching:

The framers of the [federal and state] constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.\(^\text{60}\)

More recently, in Blakely v. Washington, the Court, through Justice Antonin Scalia, explained, “the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”\(^\text{61}\) The rub in Blakely is that the Court reaffirmed only the jury’s role as fact finder.\(^\text{62}\) Washington state’s mandatory sentencing guidelines allowed a judge to increase a defendant’s sentence above the statutory maximum if the judge found the defendant acted with “deliberate cruelty.”\(^\text{63}\) The Court found this provision unconstitutional because it deprived the defendant of the right to trial by jury. The Court grounded its holding in the jury trial guarantee of the Sixth Amendment and explained that the jury right includes the right to have the jury determine aggravating factors in

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60 Id.
62 See id. at 308–09; see also Oregon v. Ice, 555 U.S. 160, 168 (2009) (“[O]ur opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury’s traditional domain.”).
63 Blakely, 542 U.S. at 300 (quoting WASH. REV. CODE § 9.94A.390(2)(h)(iii) (2010)).
sentencing. By independently finding an aggravating factor, the judge had taken the fact-finding authority away from the jury and therefore denied the defendant the right to a jury trial. The Court’s concern about judicial overreaching in *Blakely* reflects the idea that the right to determine facts, if taken from the jury, would eviscerate the jury right altogether. Thus, the question before the Court did not require the Justices to balance the competencies of judge and jury in order to decide whom among them is best able to answer a factual question regarding the existence of an aggravating factor. Rather, the question required the Court to decide the minimum authority the jury must have to function as a jury under the Sixth Amendment. The Court concluded that this absolute minimum is the right to determine “all facts legally essential to the punishment.”

Dissenting in a case where the Court applied the harmless error rule to a judge’s failure to submit the issue of materiality of certain falsehoods to the jury, Justice Scalia gave this powerful exhortation of the importance of the jury as a check on judicial power:

Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution. Who knows?—20 years of appointments of federal judges by oppressive administrations might produce judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively—at least in the view of the citizens in some vicinages where criminal prosecutions must be brought. And so the people reserved the function of determining criminal guilt to themselves, sitting as jurors. It is not within the power of us Justices to cancel that reservation . . . .

Here, Justice Scalia emphasizes an important point about the structural role and continuing relevance of the jury as a check against biased judges. While Tucker saw the independent judiciary as the cornerstone of the Constitution’s protection of individual rights, Justice Scalia suggests that the judiciary is not as independent as Tucker envisioned and is always in danger of becoming an arm of the executive instead of a check against it. Scholars like Matthew Harrington argue that the professionalization of the bench and trust in the independence and integrity of federal judges that did not exist at the nation’s

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64 Many courts, however, do not cite constitutional text for their holdings on nullification issues. *See supra* note 26.

65 *Blakely*, 542 U.S. at 313 (citing *Apprendi* v. New Jersey, 530 U.S. 466 (2000)).


67 *See supra* notes 50–52 and accompanying text.
founding justify diminutions of the jury’s law-finding authority.  
Justice Scalia points out, however, that the constitutional vision of an independent judiciary cannot be achieved to a point where the jury is no longer needed to protect individuals from the bias of judges or prosecutors. The institutions the founders created to check the power of the actors in the criminal justice system must continue irrespective of the integrity of governmental actors at any period of time because that integrity can easily shift toward authoritarianism with “judges too responsive to the voice of higher authority.” The jury must always have the authority to check such authoritarianism precisely because one cannot trust the biased judge or arbitrary prosecutor to reinstate such authority when it is needed most.

While Justice Scalia’s language in this case is evocative of the antiauthoritarian character of the jury, Justice Scalia takes issue with the fact that the jury had not determined every element of guilt—that is, the jury had not made a factual determination of every element of guilt—which he thinks the Court should have treated as a structural error rather than a harmless one. As in Blakely, Justice Scalia emphasizes the jury’s authority as representative of the people, conscience of the community, and protector of defendants against judges, who are themselves instruments of government. Taken out of context, Justice Scalia’s language suggests that the jury is the essential antiauthoritarian protector of liberty—the “spinal column of American democracy.” However, he makes these statements securely within the context of the jury’s role as fact finder. Justice Scalia is therefore free to expound on his concerns about the encroachment of unelected Article III judges on the province of the representative jury where the scope of the jury’s authority is limited to fact finding and the judge’s expertise in matters of law is not in question.

68 See Harrington, supra note 25, at 380, 405.
70 For Justice Wilson, one of the jury’s great virtues was its size and fluidity. Because the jury verdict was the decision of twelve men, not one, the jury was antidictatorial. At the same time, because the jury was constantly refreshed with a different set of twelve men, the mistakes or caprice of a particular jury could not threaten democracy as the mistakes or caprice of any one judge or legislature could. Wilson, supra note 38, at 222.
71 See Neder, 527 U.S. at 30, 33.
72 Id. at 30.
73 See Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1525–26 (1991) (describing how formalists, like Justice Antonin Scalia, often support majoritarianism and adhere to a doctrine of judicial restraint). Justice Scalia’s formalism, however, does not imply that he would support giving the jury a right to decide questions of law as well as fact. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1181 (1989) (discussing the line between the judge’s province over questions of law and the jury’s province over questions of fact).
B. The Jury as Antimajoritarian

When courts directly address the issue of jury nullification, they often describe the jury as an antimajoritarian institution, a rogue minority of individuals who have usurped the power of the legislature by nullifying laws enacted by an elected, representative body. Denying a right to nullification instructions in *United States v. Moylan*, the Fourth Circuit explained, “[n]o legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable.” The court went on to emphasize that “[t]oleration of such conduct would not be democratic . . . but inevitably anarchic.” Judge Leventhal echoed this image of the jury for the D.C. Circuit in *United States v. Dougherty*: “As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that . . . the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.” Both of these opinions paint the jury as a group of individuals that substitutes personal standards for the judgment of the legislature instead of a group that acts as a representative body in its own right. These individualistic images of the jury are a far cry from the image of the jury as an instrument of “community participation in the determination of guilt or innocence” that the *Duncan* Court described. There is no place in Judge Leventhal’s jury for jury nullification as a form of democratic participation. Both the Fourth Circuit and the D.C. Circuit place jury nullification outside of and in contradiction to democratic processes by positioning the jury in opposition to the legislature, leaving no room for any commonality of functions.

Some of the most ardent antimajoritarian language comes from the D.C. Circuit in *United States v. Washington*. Affirming a district court’s refusal to give a nullification instruction to the jury, the court explained that such an instruction would “encourage the substitution of individual standards for openly developed community rules.” By “openly developed community rules,” the court was referring to laws

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74 See Hannaford-Agor & Hans, *supra* note 9, at 1250 (describing jury nullification as “a counter-majoritarian measure” in which “a small minority of citizens . . . invalidate . . . laws that have been established through the legislative process”).
75 417 F.2d 1002, 1009 (4th Cir. 1969).
76 Id.
77 473 F.2d 1113, 1132 (D.C. Cir. 1972).
78 Alexis de Tocqueville, by contrast, analogized the jury to universal suffrage as a “means of making the majority prevail.” 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 273 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).
80 See 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam).
81 Id.
passed by Congress.\textsuperscript{82} It emphasized this point when it charged that jury nullification verdicts “are lawless, a denial of due process and constitute an exercise of erroneously seized power.”\textsuperscript{83} Although then-Judge Ruth Bader Ginsburg joined the per curiam \textit{Washington} opinion, her biting reproach of jury nullification does not carry over to her sentiment about the jury in non-nullification opinions—Justice Ginsburg, for example, joined Justice Scalia’s \textit{Blakely} opinion.\textsuperscript{84} This dichotomy is consistent with the dual approach courts often take to classifying the jury. \textit{Washington} reflects the tendency of judges to define jury nullification in a way that is incompatible with the rule of law. In the short two paragraphs the court devoted to the nullification issue, it did not mention any function of the jury as an antiauthoritarian institution. Instead, it repeatedly highlighted the individual dissidence of jurors to the rule of law.\textsuperscript{85}

IV
TENSION BETWEEN ANTIAUTHORITARIAN AND ANTIMAJORITARIAN CHARACTERIZATIONS OF THE JURY

One way to understand the judicial rhetoric on the jury is to analyze judicial attempts to construct the identity of the jury in American democracy and obstacles judges face in doing so. The tension between antimajoritarian depictions of the jury in nullification opinions and antiauthoritarian depictions of the jury in non-nullification opinions is heightened in an opinion like \textit{United States v. Dougherty}, where the court attempted to justify the limited role of the jury as fact finder from a historical perspective.\textsuperscript{86} Judge Leventhal’s \textit{Dougherty} opinion holds a particularly important place in American jurisprudence on jury nullification, as it is “the first modern case to discuss the jury nullification instruction at length and debate the wisdom of instructing the jurors about their power to nullify.”\textsuperscript{87} Consequently, “[n]o examination of jury nullification is complete without looking at [it].”\textsuperscript{88} The question before the \textit{Dougherty} court was whether the trial judge erred in refusing to inform the jury of its right to nullify the law or allow the

\begin{itemize}
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} She also joined the opinion in \textit{Apprendi v. New Jersey}, 530 U.S. 466, 490 (2000), where the Court held that the jury must find any fact that increases a defendant’s sentence above the statutory maximum, other than a prior criminal conviction.
\item \textsuperscript{85} See \textit{Washington}, 705 F.2d at 494.
\item \textsuperscript{86} \textit{United States v. Dougherty}, 473 F.2d 1113, 1132 (D.C. Cir. 1972).
\item \textsuperscript{88} Id.; see Brody, supra note 2, at 92 & n.42 (citing cases and arguing that “[t]he circuits and states that have considered the issue have thus far followed the \textit{Dougherty} majority”).
\end{itemize}
Judge Leventhal devotes nearly eight pages in the Federal Reporter to the historical evolution and modern scope of the jury’s authority. His opinion demonstrates how any attempt at thoughtful examination of the history of the jury in America must incorporate the anti-authoritarian strand of the jury’s history into a story that concludes with the modern jury as necessarily limited to deciding questions of fact. Judge Leventhal must also mitigate the historical role of the judiciary in limiting the jury’s authority to fact finding. He approaches both of these challenges by highlighting the jury’s anti-majoritarian character as a great danger to liberty and democracy. Specifically, he takes three steps to highlight the jury’s anti-majoritarian character and minimize its anti-authoritarian character: (1) he balances the relative competencies of the judge and jury in a utilitarian calculation that reflects a vision of judges as apolitical and objective deciders of the rule of law; (2) he describes how the jury’s authority to decide both law and fact was limited to the nascent, struggling democracy and is no longer necessary in a more stable democracy; and (3) he relies on legislative authorization for the limitation of the jury’s authority.

A. The Judge as Objective, Privileged Decider of Law

The conceptual understanding of the federal judge as an apolitical and objective decider of the rule of law supports Judge Leventhal’s rhetorical argument for a power shift from the jury to the judge regarding questions of law. To this extent, Judge Leventhal engages in the same utilitarian balancing that Jefferson used to reach the opposite result. While Judge Leventhal acknowledges the historical importance of the jury as a check on the power of biased judges, he emphasizes how its role has become less important as America’s democracy has prospered and its judiciary has developed into a venerable institution within America’s three-branch system of government. Explaining the shift in the utilitarian balance, Judge Leventhal writes:

The youthful passion for independence accommodated itself to the reality that the former rebels were now in control of their own destiny, that the practical needs of stability and sound growth outweighed the abstraction of centrifugal philosophy, and that the judges in the courts, were not the colonial appointees projecting royalist patronage and influence but were themselves part and par-
cel of the nation’s intellectual mainstream, subject to the checks of
the common law tradition and professional opinion, and capable, in
Roscoe Pound’s words, of providing “true judicial justice” standing
in contrast with the colonial experience.  

Thus, once federal judges became what royal judges could never
fully be according to the founders—“apolitical, scientific, and objec-
tive”—the jury’s authority to determine law was no longer defensi-
ble, especially in light of the judge’s expertise in that domain. In
contrast to judges, the jury is more prone to apply personal standards
of morality and less competent to decide questions of law.  Thus, by
characterizing judges as nonbiased, Judge Leventhal justifies the shift
in authority to decide questions of law from the jury to the judge as
making logical and evolutionary sense because the Jeffersonian bal-
ance that justified the original allocation of authority has shifted.  As
Judge Leventhal explains, “[a]n equilibrium has evolved—an often
marvelous balance—with the jury acting as a ‘safety valve’ for excep-
tional cases, without being a wildcat or runaway institution.”

Through this utilitarian calculus, Judge Leventhal demonstrates how
the jury became merely a safety valve of democracy.

Tucker’s commentary on the independent judiciary seems to
foreshadow this limitation on the jury’s authority; the founders estab-
lished an independent judiciary to isolate judges from the types of
influence that could bias their opinions. Likewise, for Judge
Leventhal, once judges’ superior qualifications were backed by a
larger structure that reduced the danger of bias, the limitation of the
jury’s authority to fact finding was inevitable. If part of the central
endorsement for the broad role of the jury as decider of fact grew out
of this utilitarian sense that the jury’s potential capriciousness was the
lesser evil to the judge’s potential bias, then a description of a more
insulated and reasoned judiciary helps Judge Leventhal justify the re-
duction in the jury’s power that occurred throughout the nineteenth
century.

B. A Whiggish View of Jury Nullification

The notion that achievement of great liberty in a society can jus-
tify the abolition of liberty’s safeguards belies the reason for the safe-
guard in the first place and is a key tension in Judge Leventhal’s

95 Id. (quoting 4 ROSCOE POUND, JURISPRUDENCE 8–9 (1959)).
96 Blinka, supra note 29, at 38.
97 See Dougherty, 473 F.2d at 1134.
98 Id. at 1132.
99 Id. at 1134.
100 Id.
101 1 TUCKER, supra note 44, app. at 355.
102 See Dougherty, 473 F.2d at 1132, 1134.
opinion. Judge Leventhal incorporates utilitarian balancing into an evolutionary description of American democracy toward a pinnacle of liberty where society no longer needs the jury to protect individuals against tyranny.\textsuperscript{103} This logic is reflected in scholarly work on the jury’s law-finding function. For example, Matthew Harrington justifies the shift in power as a result of an “increasing professionalization of the bench” and an expansion of the jury’s ranks—once “jury service was opened to a wider segment of the population, juries could no longer be counted on to speak from a common set of beliefs and experiences.”\textsuperscript{104} After explaining how “the decline of the jury’s power over law” was “entirely a judge-led exercise,”\textsuperscript{105} Harrington concludes that “[i]t was only natural, therefore, that the jury’s earlier law-making function became a casualty to the march of time.”\textsuperscript{106} Harrington’s description comports with a view that popular control over the law is central to a nation founded on the principle of popular sovereignty but that “naturally” this conferral of power to the people in the form of the jury is short lived and gives way to a more formalized law-making process.\textsuperscript{107}

Judge Leventhal and Harrington interweave utilitarian balancing with an evolutionary perspective of the jury. These accounts reflect the type of Whiggish view of history for which scholars like Sir Henry Maine have been criticized.\textsuperscript{108} Specifically, Harrington attributes the decline in the jury’s power to a weakening of the jury’s status as members from lower social classes entered its ranks and as American society became less community based and more individualistic.\textsuperscript{109} Thus, the decrease in jurors’ community ties and competency justified the jury’s decline in power, as jurors’ limited expertise in the law became ever more contrasted with that of the judge. A big weakness of this argument is that it assumes there is a point in a nation’s development where the threat of tyranny and authoritarianism becomes so low that the nation should discard or winnow down former protections. In re-

\textsuperscript{103} See id. at 1132 (“As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that . . . the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.”); supra Part IV.A.

\textsuperscript{104} Harrington, supra note 25, at 380.

\textsuperscript{105} Id.

\textsuperscript{106} Id. at 440.

\textsuperscript{107} See Hannaford-Agor & Hans, supra note 9, at 1257–58 (explaining how growing faith in government and political efficacy and the idea that government officials who make the law are “accountable to the citizenry” creates less need for “citizens to nullify the law in their capacity as trial jurors”).


\textsuperscript{109} See Harrington, supra note 25, at 435 (“The increasingly pluralist nature of the new American Republic made it less likely that the jury would apply ‘standards shaped by a template of common beliefs.’” (quoting Bruce H. Mann, Neighbors & Strangers: Law and Community in Early Connecticut 71 (1987))).
response to the argument that jury independence is no longer as necessary in modern society where public officials are answerable to a democratic citizenry, Thomas Regnier explains:

[The founders didn’t see it that way. Even as they were creating a government in which the people had a greater voice than ever before, they insisted on the trial by jury. . . . The founders were acutely aware of the tendency of those in power to crave more power, and they knew that even popularly elected institutions could become corrupt. Democratically chosen judges may become beholden to their campaign contributors, and appointed judges may feel an obligation to those who appointed them.110

Regnier’s argument has striking similarities to Justice Scalia’s Neder v. United States dissent.111 Justice Scalia admonished against judicial overreaching because he recognized the continuing importance of the jury as a check on arbitrary power.112 But Justice Scalia confined his argument to the status quo of the jury as fact finder. He did not engage in utilitarian balancing but instead took the boundaries of the jury’s authority with regard to fact finding as given. Both the Neder majority and dissent viewed the jury’s right to decide questions of fact as unquestionable and thus beyond utilitarian balancing.113 Judge Leval and Harrington’s evolutionary and utilitarian story of the jury thus only applies in the context of nullification.

C. The Judge-Led Movement to Restrict the Jury Power as Fox Guarding the Henhouse

Regardless of whether Judge Leval is right about the competencies of federal judges, he must contend with the question of whether judges ever had the power to unilaterally remove the jury’s authority to decide questions of law. Judge Leval does not raise the concern of judicial overreaching that Justice Scalia and the Duncan majority expressed, but his opinion makes clear that it lingers backstage. A judicially orchestrated change in the scope of the jury’s power presents the constitutionally troubling scenario that Justice Scalia recognized when he emphasized the implausibility that the framers would have “left definition of the scope of jury power” to the judiciary where the jury was meant to check judicial bias.114 Judge Leval’s effort to ground the antinullification holding in a histor-
The dual character of the jury as antiauthoritarian and antimajoritarian shapes and underlies modern debate on jury nullification. Arie Rubenstein, for example, emphasizes the Supreme Court’s decision incorporating the jury right in *Duncan v. Louisiana* as a shift away from formalism toward recognition of the importance of the jury in the American legal system. He explains that “jury nullification is consistent with the Supreme Court’s jury trial jurisprudence” and that this shift in jurisprudence should lead to a more favorable reception of jury nullification by the Supreme Court. Rubenstein scolds the federal courts for continuing to apply a formalistic approach to jury nullification based on the Supreme Court’s *Sparf v. United States* decision instead of following the Supreme Court’s more pragmatic jurisprudence marked by *Duncan v. Louisiana*. Rubenstein argues that

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117 See Rubenstein, *supra* note 2, at 976.
118 Id. at 984.
119 See id. at 961, 975 (arguing that “lower courts continue to rely on nineteenth-century formalist precedent for the proposition that nullification has no place in the courtroom”).
the jury should have more decision-making authority to serve the ends of “preventing oppression and promoting democracy” that *Duncan* and *Blakely* espouse.120 However, this Note demonstrates that the antiauthoritarian language in *Duncan* and *Blakely* is misleading because *Duncan* and *Blakely* are non-nullification cases. Arguments like Rubenstein’s misconceive Supreme Court and circuit court jurisprudence on the jury because they only focus on non-nullification opinions that espouse very favorable, antiauthoritarian images of the jury that are more consistent with a functionalist approach to the jury than the antimajoritarian formalism that has consistently characterized jurisprudence on the jury in jury nullification cases.

So long as the jury’s authority is limited to fact finding, courts will expound on the important functions of the jury. The problem is that these non-nullification opinions do not engage in the utilitarian calculus that would justify a broader role for the jury in the criminal justice system. They assume the scope of jury authority is limited to fact finding. Thus, the antiauthoritarian language in isolation might suggest that the “marvelous balance” in *Dougherty* was incorrect: the jury has important functions beyond fact finding, is more competent than Judge Leventhal described, and consequently should have authority to decide questions of law in certain circumstances.121 But, Judge Leventhal used utilitarian balancing to justify the removal of all law-finding functions of the jury, which sweeps much more broadly than the specific question of the right to nullification instructions that the court was asked to address. Judge Leventhal’s utilitarian reasoning was more a justification for the conclusion he wanted to reach about the scope of the jury’s authority in all situations than an endorsement of a balancing approach to the division of power between judge and jury.122 Lower courts’ unsuccessful attempts to increase the scope of the jury’s authority through utilitarian arguments underscore this point.

In *United States v. Polizzi*, Judge Jack B. Weinstein held that the district court committed constitutional error by refusing a defendant’s request to instruct the jury on the mandatory minimum sentence of five years for the crime of possessing child pornography.123 Judge Weinstein concluded that the defendant had a Sixth Amendment

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120 Id. at 982 (explaining that the scope of the jury’s authority should be much more expansive “[i]f what matters is ‘the function that the particular feature performs and its relation to the purposes of the jury trial’” (quoting Williams v. Florida, 399 U.S. 78, 99–100 (1970))).

121 *Dougherty*, 473 F.2d at 1134.

122 See infra Part VI (discussing Judge Harold Leventhal’s strategic use of utilitarian reasoning).

right to this instruction.124 The jury cannot exercise its power of leniency appropriately, he explained, if it is not aware of the sentence that must follow from a guilty verdict. He offered a different utilitarian balance that would allow for such instructions:

[C]ourts following Sparf appear to reflect a pervasive fear that our heterogeneous jurors, unbound by common principles of morality, education and dedication to the law, may deviate too far from judicial views of the rule of law unless juries are tightly controlled. This lack of faith in the good sense of juries is not generally shared by trial judges who deal with them on a daily basis.125

Furthermore, Judge Weinstein quoted Justice Scalia’s language on judicial overreach in Neder to support the argument that the jury should retain the right to impose leniency but cannot do so if it does not know the sentences involved.126 Here, Judge Weinstein engaged in selective opinion writing since he did not mention that Justice Scalia was referring to a concern of judicial overreach with regard to the jury’s well-recognized fact-finding authority. The Second Circuit vacated Judge Weinstein’s opinion, explaining that its precedent, namely United States v. Thomas, rejects any judicial encouragement of jury nullification.127 The Supreme Court has expressed a similar view regarding instructing the jury about the sentencing consequences of its verdict, explaining that “providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.”128

Judge Weinstein, however, is not alone in his belief that Supreme Court decisions have paved a path for a more functionalist approach to the jury that should permit, and even require, judicial instructions on mandatory sentences. Lance Cassak and Milton Heumann describe the Blakely decision as part of a “revolution in sentencing in which the Supreme Court has found in the Sixth Amendment right to a jury trial the requirement that . . . juries find the facts that determine the punishment.”129 Like Regnier,130 Cassak and Heumann argue that informing the jury of mandatory minimum sentences for crimes at the guilt phase of trial would not encourage jury nullification but help the jury fulfill its constitutionally mandated role:

If . . . one accepts that, as a general proposition, jurors have a role in sentencing decisions . . . and further that this derives from the

124 See id. at 404–05.
125 Id. at 421.
126 See id. at 428.
127 See Polouizzi, 564 F.3d at 161.
129 Cassak & Heumann, supra note 2, at 438.
130 See Regnier, supra note 18, at 779–80.
constitutional right to trial by jury, then advising jurors about punishment and allowing them to act on that information is not a matter of jury nullification, but simply one manner in which the jury carries out its assigned and constitutionally protected duty.\textsuperscript{131}

Thus, Cassak and Heumann emphasize that the underlying logic of recent Supreme Court decisions requires serious reconsideration of the severe general rule that jurors should not be instructed of “the punishment to be meted out in the cases in which they sit because their role is limited to finding facts.”\textsuperscript{132} Nevertheless, they are not as optimistic as Rubenstein or Judge Weinstein about the necessary impact of recent Supreme Court decisions on the scope of the jury’s authority, expressing some skepticism about the sincerity of the Court’s opining on the functions of the jury in American democracy while still acknowledging the logical import of these opinions.\textsuperscript{133}

\section*{VI

FUNCTIONALIST BALANCING VERSUS A FORMALIST BRIGHT-LINE RULE

The Supreme Court’s \textit{Sparf v. United States} opinion is widely understood as inking the sharp line that divides the judge and jury’s authority into the two distinct categories of law and fact.\textsuperscript{134} Circuit courts have followed suit, holding that a jury does not have the right to nullification instructions because it only has the power to nullify the law by virtue of the fact that acquittals are not reviewable or punishable.\textsuperscript{135} Nullification instructions are consistent with a right to acquit a defendant who is guilty under the law because certain rights implicate the court’s duty to protect those rights.\textsuperscript{136} Power to act, however, does not implicate any duties but instead is merely the byproduct of other protections, such as jurors’ protection from punishment for their verdicts.\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{131} Cassak & Heumann, \textit{supra} note 2, at 494.
  \item \textsuperscript{132} \textit{Id.} at 412 n.6, 496.
  \item \textsuperscript{133} See \textit{id.} at 496 (explaining that “ours is also a system that believes—or at least pays lip service to the idea—that juries play a central role in safeguarding our basic liberties” and that “the Supreme Court has embarked on a ‘revolutionary’ reconsideration of the role of the jury in sentencing”).
  \item \textsuperscript{134} See Howe, \textit{supra} note 27, at 588–89.
  \item \textsuperscript{135} \textit{E.g.}, United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (“A jury has no more ‘right’ to find a ‘guilty’ defendant ‘not guilty’ than it has to find a ‘not guilty’ defendant ‘guilty,’ and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law.”).
  \item \textsuperscript{136} See Schopp, \textit{supra} note 28, at 2062 (explaining that standard jury instructions, which inform jurors that they must apply the law as instructed by the judge, would burden a right to nullify by making it less likely that jurors will exercise that right).
  \item \textsuperscript{137} This protection dates to \textit{Bushell’s Case}, where Chief Justice Sir John Vaughan held that jurors could not be punished for their verdicts. (1670) 124 Eng. Rep. 1006 (C.P.). In \textit{Bushell’s Case}, the Court granted a writ of habeas corpus to Edward Bushell, who had been
\end{itemize}

Instead of asking how the right is prescribed, judges deny the right altogether, as if any recognition of the right presumes the logical extremity of absolute disregard and disrespect for the rule of law. In *United States v. Thomas*, for example, the Second Circuit explained, “the power of juries to ‘nullify’ or exercise a power of leniency is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.” Judge Leventhal echoed the same sentiment in *Dougherty*. However, as explained in Part IV, Judge Leventhal threw in a logical wrench by discussing the jury’s authority in terms of consequentialist reasoning only to conclude that the jury’s limited fact-finding authority is beyond such reasoning. This illogic is demonstrated in an analogy Judge Leventhal drew between jury nullification instructions and speed limit signs. He compared the difference between traditional jury instructions and jury nullification instructions to the difference between a speed limit sign that reads “60 m.p.h.” and a speed limit sign that reads “[d]rive as fast as you think appropriate, without the posted limit as an anchor.” The result: anarchy. Judges typically remind the jury of its duty to follow the law provided to it in their jury instructions. Despite these reminders, instances of jury nullification still occur from time to time. Likewise, a sign limiting speeds to “60 m.p.h. produces factual speeds 10 or even 15 miles greater.” However, jury nullification instructions would produce a complete unraveling of the system just as a sign that says “[d]rive as fast as you think appropriate” would be a huge safety hazard and a risk many policymakers would deem not worth taking. For Judge Leventhal, there is no in-between when it comes to jury nullification. There is a 60 miles per hour speed limit or no speed limit at all, or worse a sign declaring to the world that there is no speed limit at all.

Judge Leventhal's analogy illustrates the important distinction between a right and a power in the jury nullification debate. If Judge Leventhal thought the jury should be able to determine questions of

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138 116 F.3d at 615.
139 473 F.2d 1113, 1134 (D.C. Cir. 1972).
140 Id.
141 See id. at 1132 (explaining how the judge instructs jurors that they “are required to follow the instructions of the court on all matters of law” as part of common “legal practice and precedent”).
142 Id. at 1136–37.
143 Id. at 1134.
law in certain situations based on the utilitarian balance of competencies between judges and jurors, he would not analogize jury nullification instructions to a sign declaring no speed limit at all. He would instead ask: what speed limit sign would promote the best outcome on this road? Why then does he take so much care in couching his analysis in utilitarian verbiage when he believes that the division of duties between judge and jury is beyond such balancing?

Any semblance of utilitarian balancing in the Dougherty opinion had the specific purpose of justifying the shift in power from jury to judge over questions of law, not of representing a consequentialist approach to determining the scope of the jury’s authority that may differ with the circumstances of the legal question presented. There is somewhat of an illogic to the use of consequentialist balancing to reach a conclusion that is beyond such balancing, but that is exactly what Judge Leventhal does. Despite the appearance that Judge Leventhal’s holding in Dougherty is based on a utilitarian calculus, it in fact represents a deontological assumption that the jury’s authority is limited to fact finding and that the scope of its authority is beyond such utilitarian balancing. The jury merely has the power to nullify the law, but not the right to do so.144 To this extent, his opinion is consistent with the formalistic jurisprudence that the Supreme Court and circuit courts have followed with respect to jury nullification.

As mentioned in Part IV, Judge Leventhal’s utilitarian balancing in Dougherty is merely a rhetorical device to address the problematic judicially-led movement to restrict the jury’s authority to fact finding. Although Judge Leventhal engages in utilitarian balancing, he does so only as a persuasive writing device to justify the jury’s power, and not its right, to nullify law. This rhetorical device, though merely cursory, is particularly powerful. It allows Judge Leventhal to tie up any remaining fragments of the jury’s right to decide questions of law through a historical evolution of the jury that culminates in the modern “marvelous balance” of authority between judge and jury. The appearance of utilitarian balancing justifies the modern conception of the jury as a safety valve that is easily amenable to an argument for protecting and maintaining the current division of power.145

Unlike Judge Leventhal’s ultimate safety-valve argument against jury nullification instructions, arguments for jury instructions on mandatory minimum sentences like Judge Weinstein’s are consequen-

144  Id. at 1132.
145  See United States v. Anderson, 716 F.2d 446, 449–50 (7th Cir. 1983) (adopting Judge Leventhal’s discussion of the “historical origins and evolution of the community conscience or nullification verdict in Anglo-American jurisprudence” and admonishing that the defendant’s request for a nullification instruction “would have [the court] upset a carefully and painstakingly developed jurisprudential balance in this delicate and potentially explosive area” (internal quotation marks omitted)).
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tialist. Judge Weinstein talks about the high competence of the jur-
ors with whom he deals every day and charges circuit judges and
Supreme Court Justices as aloof and incorrect in their arguments that
jury nullification risks anarchy. To Judge Weinstein, these judges
are so far removed from the trial court that they misconceive the com-
petence and integrity of jurors. This argument seems to be a
proper counter to opinions like Dougherty that appear to use utilitarian
balancing to justify the limits on the jury’s authority. However, to the
extent that courts only recognize the jury’s power to nullify and the
utilitarian balancing is simply a tool to minimize the antiauthoritarian
character of the jury, arguments like Judge Weinstein’s will fall on un-
receptive ears.

Similarly, Cassak and Heumann’s arguments for a reconsidera-
tion of the general rule against informing the jury of sentencing infor-
mation are likely to fall on unreceptive ears in the circuit courts.
Blakely was revolutionary in its own right. By holding that the jury
must decide all facts legally essential to punishment, the Supreme
Court cast uncertainty on thousands of criminal sentences in which
judges had made some factual determinations in place of the jury at
the sentencing stage. Nevertheless, the language and posture of
the opinion suggests that Blakely’s revolution will likely be limited by
the factual borderlines of the jury’s authority. The Second Circuit’s
sharp reaction to Judge Weinstein’s suggestion that cases like Blakely
should open the door for juries to consider the sentencing implic-
tions of their decisions at the guilt phase demonstrates how judicial
adherence to the general rule allows for no haze along the fact-law
divide and shows how any expansion of the jury’s authority that might
courage it to step outside its factual jurisdiction and tinker along
the margins of fact and law can raise the ire of an appellate court and
all the antiauthoritarian sentiments that accompany it.

The Second Circuit’s reaction in United States v. Polizzi to Judge
Weinstein’s opinion presents an interesting case for understanding
the scope of federal jurisprudence on the jury. Judge Weinstein
was not arguing per se that the jury should be told of its authority to
nullify. He was simply arguing that more just verdicts would result if

146 See Brody, supra note 2, at 93 (“[T]he courts in Sparf and Dougherty wrongly struck
the balance by overstating the likelihood that informed juries will unjustly acquit and by
understating the harms to jurors and the justice system produced by the failure to provide
a nullification instruction.”).


148 See id.

149 See Cassak & Heumann, supra note 2, at 468–72.

150 See United States v. Polouizzi, 564 F.3d 142, 162–63 (2d Cir. 2009); Polizzi, 549 F.

151 See 549 F. Supp. 2d at 404.
the jury were informed of mandatory minimum sentences in certain situations. According to Judge Weinstein, the lenity which a jury could impose by knowing the sentence would allow the jury to perform its true function, rendering a verdict according to its conscience. The Second Circuit, however, sharply criticized and dismissed Judge Weinstein’s suggestion by placing it into the “jury nullification” issue box and reciting the familiar line that juries decide questions of fact, not law. Arguably, all the Second Circuit had to say was that excluding sentencing information from the jury was not an “abuse of discretion” on the part of the district judge and therefore Judge Weinstein erred in granting the defendant’s new trial motion. But, the Court’s strong exposition on Thomas and abhorrence for even the slightest judicial encouragement of the jury to consider anything other than the factual elements of guilt at the trial stage shows just how pervasive the formalist jurisprudence is with regard to issues that tinker with the distinction between law and fact.

Judge Weinstein’s analysis raises important questions about how much the jury should be cabined in its fact-finding function and suggests that the formalistic distinction between fact and law encompasses too much. Giving the jury information about the mandatory minimum sentence seems hardly as likely to devolve into anarchy as it is to improve the jury’s ability to make reasoned decisions based on its duty to render verdicts according to conscience. It is hardly the same as telling the jury that it can disregard the law altogether. Yet that is how the Second Circuit saw it. Consistent with Judge Weinstein’s argument for instructing the jury about the minimum sentence, if the right to nullify the law inheres in the jury, that right is by no means absolute, but can be limited to ensure a fair trial and stave off anarchy—but only so long as that right is a right and not merely a power. Although Judge Weinstein’s reasoning shows the potential benefits to the criminal justice system of a more functionalist approach to de-

152 See id. at 446.
153 See Polozzi, 564 F.3d at 162–63 (“Although jurors have the capacity to nullify, it is not the proper role of courts to encourage nullification.”).
154 Id. at 159.
155 Id. at 162 (“The only justification cited by the district court for the retrial order was that some jurors might have voted for acquittal so as to nullify the application of the harsh sentencing law had they been aware of the mandatory minimum sentence.”). The Second Circuit made sure to specify that its holding should not be taken to mean that a court may never instruct a jury of the consequences of its verdict, even though it is not required to instruct the jury of the sentencing consequences of its verdict. See id. at 160. The Second Circuit explained, however, that the instruction is only proper when it would help the jury determine the facts on the evidence, as where the district court or prosecutor misstates that a defendant would “go free” if found not guilty by reason of insanity, but not when, as here, that instruction would encourage the jury to go beyond the evidence to judge the wisdom of the sentence itself. See id. at 162 (quoting Shannon v. United States, 512 U.S. 573, 587 (1994)).
lineating the scope of the jury’s authority, a formalistic division between judge and jury (and fact and law) continues to cabin the jury from hearing anything with the potential to encourage leakage between the two domains—a division which likely comes at the expense of more just verdicts.

VII

BRIDGING THE RHETORICAL DIVIDE

Recognizing and addressing the rhetorical divide created by courts’ disparate treatment of the jury will enhance the quality of the jury nullification debate by bringing together proponents and opponents of jury nullification and asking both to examine the foundations of the assumptions they make about the jury in their arguments for and against an expansion of the jury’s authority. Commentators may be baffled as to why, despite the strength of their arguments, many courts do not yield to a more flexible approach to the jury’s authority. That is not to say that commentators have not made good arguments questioning the wisdom of isolating the jury from all information that might encourage extrafactual decisions, especially where a guilty verdict could result in a minimum sentence of five,\textsuperscript{156} ten,\textsuperscript{157} or twenty,\textsuperscript{158} years, or even life,\textsuperscript{159} in prison.\textsuperscript{160} This Note has suggested that a consequentialist argument for jury nullification, no matter how strong, will likely fail when viewed through a lens colored by the rigid safety-valve view of the jury. Proponents must therefore question the soundness of the safety-valve view in addition to arguing the wisdom of their own view instead of getting caught up in the rhetoric of appellate courts that sound in functionalism and a return to the historical vision of the jury on non-nullification issues.

\textsuperscript{156} See Polizzi, 549 F. Supp. 2d at 322.
\textsuperscript{157} See United States v. Brewer, 624 F.3d 900, 907 (8th Cir. 2010).
\textsuperscript{159} Id. at *2.
\textsuperscript{160} See Jeffrey Bellin, Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction, 90 B.U. L. Rev. 2223, 2224–26 (2010); Milton Heumann & Lance Cassak, Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases, 20 A.M. Crim. L. Rev. 343, 388 (1983); Caren Myers Morrison, Jury 2.0, 62 Hastings L.J. 1579, 1630 n.333 (2011) (“[I]n cases where the punishment, by any rational measure, seems disproportionate to the crime, one wonders whether the jury would have changed its verdict if it understood the consequences.”); Kristen K. Sauer, Note, Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences, 95 Colum. L. Rev. 1232, 1260 (1995) (arguing that courts that deny a defendant’s request to instruct the jury on the sentencing consequences of a guilty verdict “fail to appreciate the long-acknowledged political function of the jury as a check on potential governmental oppression” and criticizing cases that deny this instruction request as “based on conclusory restatements of the general rule”).
There are many cracks in the seams of the safety-valve view, and proponents may attack both the wisdom of a deontological approach to the jury’s authority and the current health of the jury as the “safety valve” of the criminal justice system. They may start by trying to show that the result of giving the jury more authority would not be a deluge, but a more flexible system, and stressing how even a safety-valve system cannot work properly if there are not from time to time adjustments in its pipes. Judge Weinstein’s argument for instructing the jury on the mandatory minimum sentence suggests that the safety-valve view has cabined the jury at a very high price. Much of the most ardent criticism of jury nullification comes from opinions that deal with the issue of whether the jury should be informed of its right to nullify. Such an instruction would be a watershed in jury rights. An argument may be made, however, that the strong antiauthoritarian sentiment and strict formalism fostered by nullification-instruction cases are ill-suited for other jury authority questions, including the question of whether to inform the jury of mandatory minimum sentences. Judge Leventhal stated that the jury would function best if it came to the decision to nullify on its own on the view that to instruct the jury of its power would be paramount to anarchy and undo the right altogether. But one might ask how the jury can properly serve its role as a safety valve for extraordinary cases if it is not given the opportunity to determine whether the case before it is extraordinary. For example, a court cannot expect a jury to make a moral determination about a conviction if it does not have sufficient information to

161 In United States v. Simpson, the Ninth Circuit expressed a somewhat mixed view of the jury, showing that, at least in theory, it might be amenable to a more utilitarian view or would be willing to cabin the “nullification” label, allowing slack along the periphery of the safety-valve view. 460 F.2d 515, 518–20 (9th Cir. 1972). Although Judge Walter Raleigh Ely held that the district court did not err by refusing to instruct the jury that it could acquit the defendant irrespective of the evidence of guilt, the judge explained that “American judges have generally avoided such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear.” Id. at 520. Because Judge Ely believed this safeguard was adequate to ensure just verdicts, he saw no need to depart from existing law. Although his explanation could be mere rhetoric, like Judge Leventhal’s apparent utilitarian balancing, his opinion differs from those in Dougherty and Thomas in that Judge Ely acknowledges the safety-valve view of the jury but leaves the door open to the possibility that judges may need to impose additional measures in the future to ensure that a jury is able to acquit against the evidence.

162 Richard St. John, Note, License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking, 106 YALE L.J. 2563, 2564 (1997) (“Since Sparf, judges and commentators who have weighed in on the issue of jury nullification have typically asked whether nullification either makes for good public policy or, even further, is mandated by one or more provisions of the U.S. Constitution.”).

163 United States v. Dougherty, 473 F.2d 1113, 1136–37 (D.C. Cir. 1972) (“[I]t is pragmatically useful to structure instructions in such wise that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions.” (footnote omitted)).
determine whether the sentence imposed by the law is oppressive or unjust. Such an argument against the safety-valve view could pave the way for utilitarianism by necessitating the follow-up question of whether the jury is capable of distinguishing the extraordinary from the mundane.

CONCLUSION

Contrary to commentators who suggest that recent Supreme Court opinions on the jury represent a shift in jurisprudence from formalism to functionalism and therefore justify a more expansive role for the jury to determine both questions of law and fact, judicial formalism is still very much intact with regard to jury nullification. The jury’s dual character as antiauthoritarian and antimajoritarian underlies modern debate on jury nullification and reflects deep-seated sentiments about the respective roles and competencies of judges and jurors. In isolation, the Supreme Court’s praise for the jury as a protector of liberty in American democracy in non-nullification cases might suggest a shift toward a more functionalist jurisprudence on the jury. However, the dichotomy in judicial treatment of the jury between cases that involve jury nullification issues and cases that do not suggests that circuit courts’ unyielding commitment to the bright-line distinction between judge and jury over questions of law and fact is consistent with Supreme Court jurisprudence on the jury.

Nullification opinions and non-nullification opinions remain separated by a strong rhetorical divide. Despite well-crafted arguments that delegating more authority to the jury to decide questions of law will foster a more just administration of the law, or “do[ ] justice in light of the law” according to Judge Weinstein, these arguments will likely continue to be just that—good arguments trapped in the divide between two different world views of the jury. Critics of the bright-line division of power along the fact-law divide and proponents of jury nullification may continue to call upon higher courts’ brazen praise for the jury in non-nullification opinions and their occasional reliance on consequentialist reasoning in nullification opinions to argue for a more expansive role for the jury. Legal commentators like Arie Rubenstein and district court judges like Judge Weinstein may try to break holes in higher courts’ constructions of the jury by emphasizing the antiauthoritarian character of the jury that those courts have appeared to recognize in their opinions. Yet Judge Weinstein’s efforts demonstrate that the reasoning of one side of the divide cannot so easily be transported to the other.

164 See Morrison, supra note 160, at 1630 n.333.
Although recent decisions expanding the jury’s fact-finding authority in cases like *Blakely* are significant in their own right, they are unlikely to lead to a Supreme Court sanction of the jury’s authority to decide anything other than facts anytime soon. To the extent that judicial use of antiauthoritarian language is limited to cases that do not impinge on the judge’s role as a decider of law, and to the extent that consequentialist reasoning in opinions like *Duncan* is merely a rhetorical tool that judges use to justify the current division of power between judge and jury, arguments for an expansion of the jury’s authority beyond fact finding that are rooted in antiauthoritarian language and consequentialist reasoning will not survive judicial inspection because they overlook the antimajoritarian character of the jury and continued formalism espoused by opinions that directly address jury nullification.